

Mailed:
March 23, 2004

This Opinion is Not
Citable as Precedent
of the TTAB

Paper No. 11
GFR

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Stellar Technologies, Inc.
v.
Kenneth Dale Bristow

Opposition No. 91125770
to application Serial No. 75927446
filed on February 25, 2000

James A. Wahl of Mackall, Crounse & Moore, PLC for Stellar
Technologies, Inc.

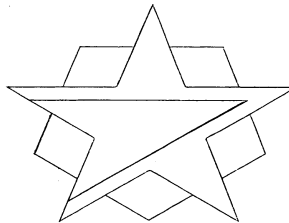
Kenneth Dale Bristow, pro se.

Before Holtzman, Rogers and Drost,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Kenneth Dale Bristow [applicant] has filed an
application to register the mark shown below:

**Stellar
Technologies**



The application is based on applicant's stated intention to use the mark in commerce for goods now identified as "products which have the ability, electronically or mechanically, to locate, acquire and transduce sources of energy through electronic circuits and gear assemblies, namely, photovoltaic modules, battery chargers, electric inverters, electronic pulse generators, and frequency detectors," in International Class 9.

Stellar Technologies, Inc. [opposer] has opposed issuance of a registration to applicant, asserting as grounds therefor a claim under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). Specifically, opposer asserts that it has registered the word mark STELLAR TECHNOLOGIES and a STELLAR TECHNOLOGIES design mark featuring a star and an oval frame or carrier; that it began using the word mark in August 1995 and began using it in commerce on October 31, 1995, i.e., both dates prior to applicant's filing date; that it obtained registrations for both its marks on February 23, 1999, prior to applicant's filing date; that applicant's mark "is substantially similar" to opposer's STELLAR TECHNOLOGIES mark; that applicant's goods "are substantially similar and related" to opposer's goods¹; and that there is a likelihood of confusion among consumers.

¹ Opposer's registrations list its goods as "precision components for medical devices, namely, components for implantable heart pacemakers and defibrillators, namely, leads, contacts, connector

Applicant denied each of the allegations of opposer's pleading, except that he admitted opposer's allegations regarding what mark and goods are covered by applicant's application. The record does not reveal whether the parties engaged in any discovery. The trial schedule was reset once on a consented motion filed by opposer.

During its main testimony period, opposer noticed and took the deposition of applicant. During that deposition, applicant did not make any admissions that support opposer's case. Opposer did not take any other testimony or file any notices of reliance. We note, in particular, that opposer did not file a notice of reliance on certified copies of its pleaded registrations.

Applicant, as is his right, did not take any testimony and did not introduce any evidence by notice of reliance. Notwithstanding that applicant did not put on a defense, opposer filed an affidavit and three exhibits from its director of sales and new technology, Dennis Forcelle, during the period scheduled for rebuttal.

Opposer filed a brief, but applicant did not. Neither party requested an oral hearing.

blocks, electrodes and electrode rings; components for implantable fusion pumps used to deliver and regulate the flow of drugs, namely, valves, reservoirs, valve seats, filter disks, inlet cones, plug pump inlets and pump housing; implantable stents for use in angioplasty; cardiac and medical electrodes; and medical guide wires," in International Class 10, and for "manufacturing of precision components for medical devices to the order and/or specification of others," in International Class 40.

On this record, we must dismiss the opposition. As already noted, applicant did not make any admissions, either in his answer or during his deposition that would excuse opposer from having to prove, as elements of its case in chief, its ownership of its pleaded registrations and that they are valid and uncanceled, or its prior and continuous use of the registered marks. Proof of either would have established opposer's standing; proof of neither means opposer has failed to establish its standing, which is an element of the case for any plaintiff in a Board proceeding. Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1029 (Fed. Cir. 1999) (Allegations alone do not establish standing and, if challenged, must be proved as part of the plaintiff's case). Moreover, by failing to prove ownership and validity of its pleaded registrations, opposer failed to remove priority as an issue in this case. Cf. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (when a plaintiff proves ownership of a valid and subsisting registration the issue of priority does not arise). Opposer did not, on the other hand, prove priority of use.

In stating the above, it is obvious we have not considered the affidavit of Dennis Forcelle filed during the period for rebuttal testimony. Absent a written stipulation of the parties, preferably filed with the Board, a party may

not submit testimony by affidavit. See Boyds Collection Ltd. v. Herrington & Co., 65 USPQ2d 2017, 2020 (TTAB 2003) ("[W]e note that the parties may stipulate to the entry of testimony by affidavit. Trademark Rule 2.123(b) ... However, in the absence of such a stipulation, an affidavit or declaration is not admissible under a notice of reliance."); see also TBMP Sections 703.01(b) and 705 (2d ed. June 2003). Further, even if the parties had agreed to allow submission of testimony by affidavit, applicant did not put on a defense, so there is no case of applicant's to rebut and the Forcelle affidavit in its entirety therefore constitutes improper rebuttal. Finally, even if applicant had put on a defense, so that opposer would have had the right to present rebuttal evidence, much of the Forcelle affidavit, in particular his statements concerning the status and title of opposer's registrations, covers matters that are part of opposer's case in chief. The Ritz Hotel Limited v. Ritz Closet Seat Corp., 17 USPQ2d 1466, 1469 (TTAB 1990) ("As the courts have often said, one's proof of standing is a threshold matter."); Hester Industries Inc. v. Tyson Foods Inc., 2 USPQ2d 1645, 1647 (TTAB 1987) (Opposer failed to prove its case-in-chief during time allowed for doing so and Board refused to consider evidence offered during rebuttal that supported the case-in-chief).

Opposition No. 91125770

Decision: The opposition is dismissed, for opposer's failure to prove its standing and priority of use.